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7 **THE DISTRICT COURT OF GUAM**
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9 GUAM CONTRACTORS ASSOCIATION, *et al.*,

CIVIL CASE NO. 16-00075

10 Plaintiffs-Petitioners,

11 vs.

12 JEFFERSON B. SESSIONS, III,
13 Attorney General of the United States, *et al.*,

14 Defendants-Respondents.

**ORDER RE: MOTION TO DISMISS;
OBJECTIONS TO REPORT &
RECOMMENDATION**

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16 Various Guam businesses (“the employers”) have initiated this lawsuit challenging the
17 government’s recent administration of its non-agricultural temporary worker program, which
18 allows local businesses to bring foreign workers to Guam to fill a variety of temporary labor
19 roles. As they await the final result of this proceeding, the employers have sought to
20 preliminarily enjoin the government from administering the program in a way that may
21 substantially deviate from its previous administration and may be responsible for producing the
22 remarkably low approval rate for temporary worker applications observed on Guam in recent
23 years. The court referred the injunction request to the Magistrate Judge, who recommends that
24 the court deny the motion based on a lack of likelihood the employers can ultimately prevail in
the case. The employers timely objected, contending the Magistrate Judge improperly applied

1 the case law regarding the scope of the explanation required for these agency adjudications and
2 improperly interpreted some of the crucial relevant regulations. While the Magistrate Judge had
3 the injunction question under advisement, the government moved to dismiss the case entirely,
4 contending the court lacks subject matter jurisdiction and the employers have failed to state any
5 cognizable legal claim for which the court may grant relief. The parties have submitted briefing
6 on the dismissal issues, and they have timely filed their responses to the Magistrate Judge's
7 report and recommendation regarding injunction. The court heard argument on the injunction
8 and dismissal motions on December 11, 2017.

9 The Defendants' motion to dismiss (ECF No. 30) is **GRANTED in part** and **DENIED**
10 **in part**. The Plaintiffs' motion for preliminary injunction (ECF No. 8) is **GRANTED in part**.
11 The Magistrate Judge's Report and Recommendation (ECF No. 61) is **ADOPTED in part** and
12 **MODIFIED in part** as noted.

13 I. FACTUAL AND PROCEDURAL BACKGROUND

14 The Magistrate Judge ably sets forth the relevant statutory, regulatory, and factual
15 background in the report and recommendation, and the parties have lodged no objection. This
16 order incorporates the background by reference.

17 II. LEGAL STANDARDS

18 *A. Motion to Dismiss—Lack of Subject Matter Jurisdiction.* To invoke the court's subject
19 matter-jurisdiction, a party need only set forth "a short and plain statement of the grounds for the
20 court's jurisdiction." *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). The party must,
21 of course, allege facts and not mere legal conclusions, in accord with the pleading standards
22 established in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556
23 U.S. 662 (2009). *Id.* Those cases generally require that a complaint alleges factual matter that, if
24 taken as true, is sufficient to state a claim for "relief plausible on its face." *Iqbal*, 556 U.S. at

678. Assuming compliance with that standard, the factual allegations are to be taken as true unless challenged by an opposing party. *Leite*, 749 F.3d at 1121. The government makes no factual challenge to the allegations here; instead, its facial attack accepts the employers’ factual allegations as true and contends that even if true, they cannot establish jurisdiction. *Id.* The court’s task in resolving the challenge is simply to determine “whether the allegations are sufficient as a legal matter to invoke the court’s jurisdiction.” *Id.*

B. Motion to Dismiss—Failure to State a Claim. The task for evaluating a motion to dismiss for failure to state a claim is closely related, as the court must again determine whether the complaint contains factual matter sufficient to state a claim for relief plausible on its face. *See Iqbal*, 556 U.S. at 678. The court may determine “a claim has facial plausibility when the plaintiff sets forth factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* Plausibility, the Supreme Court has explained, is to be distinguished from probability of success—which is not required—and from “sheer possibility” of unlawful conduct—which will not suffice. *Id.* Generally, the court takes any factual allegations in the complaint as true and construes the pleadings in the light most favorable to the nonmoving party. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). But the court need not accept as true allegations contradicted by judicially noticeable facts, and the court may appropriately look beyond the complaint to matters of public record. *See, e.g., Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000); *Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir. 1995).

C. Preliminary Injunction. Typically, a party seeking a preliminary injunction must establish a likelihood of success on the merits, a likelihood of irreparable harm in the absence of preliminary relief, the balance of the equities weighs in his or her favor, and the injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). But

1 preliminary injunctions may take multiple forms, and certain forms may require a heightened
2 showing from the seeking party. Prohibitory injunctions, which prohibit a party from taking
3 action and preserve the status quo pending a final determination of the legal action, generally
4 require only the showing as articulated in *Winter. Marlyn Nutraceuticals, Inc. v. Mucos Pharma*
5 *GmbH & Co.*, 571 F.3d 873, 877 (9th Cir. 2009). Mandatory injunctions, by contrast, go “well
6 beyond simply maintain[ing] the status quo” and have often been disfavored; as a result, they
7 have generally required a showing that “extreme or very serious damage will result” in the
8 absence of preliminary relief. *Id.*

9 **III. DISCUSSION**

10 *Subject Matter Jurisdiction.* The government’s basic argument with respect to
11 jurisdiction appears to be based on an objection to the scope of the relief the employers seek.
12 The broad scope, the government suggests, is indicative of a “wholesale” or “programmatic”
13 challenge to the agency’s implementation of some program of visa adjudication not yet precisely
14 identified by anyone—which may constitute a kind of challenge previously frowned upon by the
15 Supreme Court. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 890 (1990). Because the
16 challenge here is fundamentally “programmatic,” the government adds, the employers have
17 failed to identify in their complaint any “discrete, final” agency action that might serve as a
18 jurisdiction-conferring foundation for their claims. *Id.* That is particularly true, the government
19 emphasizes, for the various petitions still pending in front of the agency and any petitions not yet
20 submitted—over those petitions, it maintains, the court has no jurisdiction.

21 This collection of positions presents several problems. First, whether “finality” or any
22 other reviewability provisions in the Administrative Procedure Act (“APA”) constitute
23 “jurisdictional” requirements appear to be unsettled questions in the case law. Nothing in the
24 text of the APA suggests any of its reviewability requirements are jurisdictional, and the cases

1 have observed as much. *See, e.g., Air Courier Conference v. Am. Postal Workers Union*, 498
2 U.S. 517, 523 n.3 (1991) (“The judicial review provisions of the APA are not jurisdictional.”);
3 *see also Iowa League of Cities v. E.P.A.*, 711 F.3d 844, 863 n.12 (8th Cir. 2013); *Trudeau v.*
4 *FTC*, 456 F.3d 178, 183–84 (D.C. Cir. 2006). Nevertheless, the Ninth Circuit has at times
5 adopted the position that “finality is a jurisdictional requirement to obtaining judicial review
6 under the APA.” *Fairbanks N. Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d 586,
7 591 (9th Cir. 2008); *Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 264 n.1 (9th Cir. 1990)
8 (“[F]inality is . . . a jurisdictional requirement.”). But as the Supreme Court has relatively
9 recently explained, “jurisdiction is a word of many, too many, meanings,” and courts generally
10 err in treating statutory restrictions on suit as jurisdictional where Congress has declined to
11 explicitly identify the restrictions as jurisdictional. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516
12 (2006). The courts acknowledging and examining those principles from *Arbaugh* have thus
13 generally concluded that APA claims carry no jurisdictional requirement of finality or ultimate
14 reviewability; instead, APA claims simply invoke the court’s jurisdiction by way of posing a
15 federal question, as envisioned by 28 U.S.C. § 1331. *See, e.g., Vietnam Veterans of America v.*
16 *Shinseki*, 599 F.3d 654, 661 (D.C. Cir. 2010) (noting court had repeatedly held prior to 2005 that
17 the “APA’s reviewability provisions were jurisdictional,” but that the contrary view is “firmly
18 established” in light of developing Supreme Court case law on the meaning of “jurisdiction”);
19 *accord Pakootas v. Teck Cominco Metals, Ltd.*, 646 F.3d 1214, 1220 (9th Cir. 2011)
20 (highlighting Supreme Court’s recent focus on “whether the word ‘jurisdiction’” is “used in a
21 sentence controlling the claim at issue”).

22 Here, the employers present various claims arising under the APA and regardless whether
23 they have adequately stated those claims, by raising them they have adequately invoked the
24 court’s federal question jurisdiction—as various courts have recognized. *See, e.g., Haines v.*

1 *Fed. Motor Carrier Safety Admin.*, 814 F.3d 417, 424 (6th Cir. 2016) (“[T]he district court had
2 subject matter jurisdiction over [claimant’s] APA claim under the federal question statute.”);
3 *Trudeau v. Fed. Trade Comm’n*, 456 F.3d 178, 185 (D.C. Cir. 2006); *see also Proyecto San*
4 *Pablo v. I.N.S.*, 189 F.3d 1130, 1136 n.5 (9th Cir. 1999) (“In the absence of a specific statutory
5 provision to the contrary, district courts have jurisdiction to review agency action as part of their
6 general federal question jurisdiction.”); *accord Rd. Sprinkler Fitters Local Union 669 v. Herman*,
7 234 F.3d 1316, 1319 (D.C. Cir. 2000) (“28 U.S.C. § 1331 . . . gives federal courts what the APA
8 does not: jurisdiction of all civil actions arising under the . . . laws . . . of the United States.”
9 (internal quotation marks omitted)). On this rationale alone, the government’s motion to dismiss
10 fails.

11 Even if, however, some reviewability provision might serve as a jurisdictional
12 requirement, the employers somewhat incredulously and appropriately point out that they have
13 adequately identified discrete, and final, agency actions here, distinguishing this case from the
14 various cases rejecting more amorphous challenges. They have, in other words, identified for
15 each named plaintiff the specific petitions (and the total number) giving rise to objections, the
16 years in which the petitions were brought, and the status, if any, of any pending appeal or request
17 for additional evidence from the agency. *See, e.g.*, ECF No. 23 at 6–12; *id.* at 18 n.20. And for
18 purposes of any “discrete” or “final” “agency action” requirement, the government has no
19 serious quarrel that those identifications are insufficient. The government implicitly concedes as
20 much at note 7 of its motion to dismiss and explicitly concedes as much elsewhere, emphasizing
21 that the adjudications identified by the employers here are appropriately described as “agency
22 process[es] for the formulation of an order” under the APA, and the resulting orders are
23 appropriately characterized as “the whole or a part of a final disposition” under the APA. *See*
24 ECF No. 31 at 27 n.7; *see also* ECF No. 50 at 1 (“This is a textbook [APA] challenge to final

1 agency actions[.]”). The APA’s language appears to confirm reviewability here in similarly
2 explicit terms, providing in at least one location that “agency action includes the whole or a part
3 of an agency . . . order.” 5 U.S.C. § 551(13). Based on this standard understanding of the APA’s
4 provisions, the courts have had no trouble concluding denials of visa petitions constitute agency
5 actions appropriate for review. *See, e.g., Spencer Enterprises, Inc. v. United States*, 345 F.3d
6 683, 688 (9th Cir. 2003) (identifying the “particular agency action at issue” as “INS’s denial of
7 an immigrant investor visa petition”); *Abboud v. I.N.S.*, 140 F.3d 843, 847 (9th Cir. 1998)
8 (“[B]ecause the INS’s denial of [claimant’s visa petition] was a final order, we conclude that the
9 district court had jurisdiction over this matter.”); *Khalil v. Napolitano*, 983 F. Supp. 2d 484, 488–
10 89 (D.N.J. 2013) (“[T]he district courts may review the final determinations of visa denials when
11 they are alleged to have violated the terms of the APA.”).

12 As for those petitions which have not been finally adjudicated (including, for example,
13 those the employers themselves identify as not yet filed)¹, it may be useful to distinguish
14 between the claims brought and the relief sought, because jurisdiction should not, ordinarily,
15 depend on the nature of the relief requested—so whether any relief here might extend to
16 applications not yet filed sheds very little light on this question of dismissal. *See, e.g., Avco*
17 *Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 561 (1968) (“The nature of the relief available after
18 jurisdiction attaches is, of course, different from the question whether there is jurisdiction to
19 adjudicate the controversy.”). And even for purposes of evaluating the claims, whether the
20 petition has been finally adjudicated may not matter much, particularly if the agency has
21 developed some “definitive position” with respect to the statutory and regulatory language that

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23 ¹ Claims based solely on petitions not yet filed or adjudications not yet final clearly might present ripeness or
24 standing issues in the typical case—but nobody seriously disputes the employers’ claims here arise based largely, if
not entirely, on adjudications already made final. *See, e.g.,* ECF No. 23 at 3–4 (seeking judicial review of “USCIS’
decisions denying [employers’] H-2B petitions for temporary workers”); ECF No. 50 at 1 (“No matter how Plaintiffs
may frame this lawsuit, they are before the Court seeking judicial review of [USCIS’s] final decisions denying their
. . . visa petitions.”).

1 will largely dictate the result for any forthcoming petitions—as the employers suggest is the case
2 here. *See, e.g., City of Dania Beach v. FAA*, 485 F.3d 1181, 1188 (D.C. Cir. 2007) (concluding
3 an agency letter constituted final agency action where “[n]othing in the letter indicate[d] that the
4 [agency’s] statements and conclusions [were] tentative, open to further consideration, or
5 conditional on future agency action.”). Perhaps recognizing that principle, various courts have
6 been willing to grant the kind of broad both backward- and forward-looking relief the employers
7 seek, once a pattern or practice of mistaken or erroneous adjudication has been established—and
8 a pattern of erroneous denials is precisely a showing the employers seek to make. *See, e.g.,* ECF
9 No. 23 at 18–19 (alleging “USCIS has begun to deny H-2B petition that rely on peakload and
10 one-time occurrence need at an unprecedented rate” despite presentation of labor certifications,
11 lengthy history of approvals, etc.). This kind of pattern-or-practice claim, the courts have
12 concluded, may well offer a possibility of relief even for submissions not yet adjudicated. *See,*
13 *e.g., Schisler v. Heckler*, 787 F.2d 76, 82 (2d Cir. 1986) (“SSA opposes the request on the
14 grounds that we may not, in advance of the adjudication of claims by the SSA, impose
15 substantive requirements on those adjudications. We disagree.”); *accord McNary v. Haitian*
16 *Refugee Ctr.*, 498 U.S. 479, 492 (1991) (concluding court had jurisdiction to review general
17 challenge to practices and policies employed by agency in processing applications, despite
18 statutory bar applicable to review of individual denials); *cf. Abdullah v. INS*, 184 F.3d 158, 164
19 (2d Cir. 1999) (emphasizing that “a district court may exercise jurisdiction to adjudicate pattern-
20 or-practice claims against the INS” regardless whether it has jurisdiction to review individual
21 claims). That employers have alleged both a newly-settled agency policy position and a
22 resulting pattern of erroneous adjudication suggests dismissal for lack of jurisdiction is
23 inappropriate here, regardless whether any individual petition may give rise to an actionable
24 challenge.

1 But however the discreteness or pattern-or-practice inquiries may be answered for
2 purposes of analyzing jurisdiction, another obstacle remains for the government’s “programmatic
3 relief” argument. The classic “programmatic improvement” case on which the government relies
4 featured claims alleging a whole host of potential legal violations by the Bureau of Land
5 Management, including “failure to revise land use plans in proper fashion, failure to submit
6 certain recommendations to Congress, failure to consider multiple use, inordinate focus upon
7 mineral exploitation, failure to provide required public notice, [and] failure to provide adequate
8 environmental impact statements.” *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 891 (1990).
9 This “wholesale” request for improvement was untethered to any “single BLM order or
10 regulation, or even to a completed universe of particular BLM orders and regulations.” *Id.* That
11 kind of claim, the *Lujan* court explained, presented incurable ripeness problems, because no
12 alleged violation had immediate actual or threatened effect, and it may have raised causation and
13 redressability questions to boot. *See id.*; *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 568
14 (1992) (highlighting redressability problem with claim for programmatic relief where certain
15 related agencies were not parties to the case).

16 Here, by contrast, the adjudications already made final have surely had effect on the
17 employers, and the alleged policy or interpretive change governing those adjudications has had,
18 and continues to threaten, immediate and real effects (and has already proved capable of
19 repetition yet evading review). Just as importantly, neither the alleged violations nor the
20 requested relief are nearly as broad as the violations and relief at issue in *Lujan*: the employers
21 here have identified the single piece of statutory language, the two specific regulations, and the
22 limited family of supporting regulations they believe have given rise to the agency’s alleged
23 errors, and they have identified the employers who have felt the effects and will continue to feel
24 them. *See, e.g.*, ECF No. 23 at 3–4. Those considerations suggest the employers’ claims cannot

1 fairly be characterized as claims for programmatic relief—but even if that characterization were
2 appropriate, the ripeness, causation, and redressability problems typically associated with
3 programmatic relief claims are largely absent here because the subject petitions, the consequent
4 harms, and the appropriate fix are all immediately identifiable. *See, e.g., Idaho Conservation*
5 *League v. Mumma*, 956 F.2d 1508, 1516 (9th Cir. 1992) (rejecting an argument that claimants
6 could not bring claims based on development decisions not yet made, concluding causation and
7 redressability requirements were satisfied, and explaining, “[t]o the extent that the plan pre-
8 determines the future, it represents a concrete injury that plaintiffs must, at some point, have
9 standing to challenge”).

10 Given the employers’ presentation of claims based on alleged violations of the APA, their
11 sufficiently specific identification of agency action, the presence of a pattern-or-practice
12 allegation, the government’s failure to identify any specific jurisdictional language in the
13 provisions of the APA applicable to the employers’ claims, and the absence of any of the
14 problems a much broader claim for programmatic relief might present, the court cannot conclude
15 the employers have failed to meet their burden of establishing jurisdiction here. The court will
16 deny the motion to dismiss for lack of subject matter jurisdiction.

17 *Failure to State a Claim.* In support of its motion to dismiss for failure to state a claim,
18 the government repurposes its arguments that the employers have failed to sufficiently identify
19 final or discrete actions, and adds contentions that agency conduct in earlier years is irrelevant
20 for purposes of evaluating the agency’s conduct in subsequent years, that the employers have
21 failed to identify any “change” in agency interpretation on which their claims may rely, and that
22 the employers have not identified any evidence the agency failed to consider or failed to consider
23 properly.

24 Before directly addressing the adequacy of the claim statements here, a prefatory note is

1 warranted given the state of the record. Typically, when a party seeks review of agency action
2 under the APA, the district court functions in much the same way as an appellate tribunal. *See*
3 *Rempfer v. Sharfstein*, 583 F.3d 860, 865 (D.C. Cir. 2009). A basic consequence may be that the
4 case by definition presents solely a question of law and the complaint, appropriately read,
5 presents no factual allegations at all—instead, it presents arguments regarding the proper legal
6 conclusions to be drawn from the agency action or actions at issue. *Id.* And review, as the
7 government points out, is typically based on the agency record and limited to determining
8 whether the agency acted arbitrarily or capriciously, whether the facts underlying any decisions
9 are supported by substantial evidence, and related questions as contemplated by statute. *Id.*

10 Given those propositions, whether a motion to dismiss for failure to state a claim is
11 cognizable or even analytically coherent here is questionable, for at least two related reasons.
12 First, the parties appear to be in agreement that an APA claim or claims may be at stake based on
13 the agency’s denials of the identified petitions, and the government is probably not entitled to
14 much, if anything, more for purposes of Rule 12(b), particularly given the circumscribed nature
15 of APA review. *See, e.g., Johnson v. City of Shelby, Miss.*, 135 S. Ct. 346, 347 (2014)
16 (clarifying that a party need do no more than inform the opposition of the “factual basis for [the]
17 complaint” and discouraging any “further insistence on a punctiliously stated” theory of the
18 pleadings). Second, the administrative record has not yet been filed here (and the government
19 has not yet even answered the complaint), and whether certain legal conclusions are
20 appropriately drawn for APA claims without any record is a matter of some debate in the case
21 law. *See, e.g., Ghaly v. I.N.S.*, 1994 WL 63033, at *2 (N.D. Ill. Feb. 17, 1994) (“Since the
22 administrative record has not been filed in connection with this case, this court is unable to
23 determine whether the INS’ decision was an abuse of discretion or whether the facts underlying
24 the INS’ decision are supported by substantial evidence.”); *accord Remmie v. Mabus*, 846 F.

1 Supp. 2d 91, 95 (D.D.C. 2012) (denying a motion to dismiss an APA claim, reasoning “the
2 administrative record has not yet been filed with the Court, making [any dismissal] determination
3 rather difficult”); *cf. Highway J Citizens Grp. v. U.S. Dep’t of Transp.*, 2005 WL 1076071, at *5
4 (E.D. Wis. Apr. 27, 2005) (“The full administrative record has not been filed with the court as of
5 the date of this decision, and I do not know whether plaintiffs have been able to review the full
6 record and, if not, whether they intend to make additional arguments after they do so.”).

7 But the Ninth Circuit has in the past embraced motions to dismiss for failure to
8 adequately state APA claims, and thus the court addresses each of the employers’ claims in turn.
9 *See, e.g., Zixiang Li v. Kerry*, 710 F.3d 995, 999 (9th Cir. 2013). The *Kerry* court applied to
10 various APA claims the familiar Rule 12 standard, explaining dismissal “under Rule 12(b)(6) is
11 proper only when the complaint either (1) lacks a cognizable theory or (2) fails to allege
12 sufficient facts to support a cognizable legal theory,” and the court applies that standard here. *Id.*

13 *Claim I – Regulatory Violations.* In their first claim, the employers make several
14 allegations of “regulatory violation.” They contend the Department of Labor (“DOL”)
15 certifications the employers received for each petition should have been dispositive as to
16 temporary need, at least in the absence of any additional countervailing evidence presented to
17 United States Citizenship and Immigration Services (“USCIS”). That position is at odds with
18 both the regulatory language and the case law and should be dismissed. *See, e.g.,* 8 C.F.R. §
19 214.2(h)(1)(ii)(D) (characterization of nature of services or labor “subject to review by USCIS”);
20 8 C.F.R. § 214.2(h)(6)(iii)(A) (“The labor certification shall be advice . . .”); *see also Soccer*
21 *Centers, LLC v. Zuchowski*, 2017 WL 1015844, at *4 (D.N.J. Mar. 15, 2017) (“Plaintiff’s
22 reliance on the Department of Labor’s certification falls short . . .”).

23 But the employers contend in the alternative that, regardless whether the petitions
24 initially, based on the DOL certifications, presented requests for peakload or one-time

1 occurrence employees, USCIS was required, but failed, to convert and then approve the petitions
2 under whatever the most appropriate characterization of need may have been. The employers
3 cite no specific authority for that proposition, but throughout the complaint they frequently make
4 explicit the idea that they rely on basic principles of APA review—in other words, they claim the
5 agency’s failure on this ground was either arbitrary and capricious, or unsupported by substantial
6 evidence, or unlawfully withheld, or some combination of the three. *See* 5 U.S.C. § 706; *see*
7 *also Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 65 (2004) (noting party is entitled to review
8 of both agency action and any inaction prohibited by law or regulation having the force of law).
9 Any of those theories, given the complaint’s allegations and the absence of an administrative
10 record, constitutes a plausible theory of relief, and the court concludes dismissal of this
11 contention, and thus the claim, is inappropriate under Rule 12(b)(6).

12 The remaining contentions appear to offer support for those potential theories and, in
13 some cases, are duplicative of theories advanced in other claims, and the court will give them no
14 further attention here.

15 *Claim II – 5 U.S.C. § 553 Rulemaking Required.* As a second claim, the employers
16 contend the agency has adopted new interpretations of the regulatory definitions governing the
17 petitions here, despite the absence of any changes in the relevant law or regulations or the
18 operative facts—and changing an interpretive rule or policy in these circumstances without
19 engaging in the administrative rulemaking process set forth in 5 U.S.C. § 553, they maintain,
20 violates the requirements of that section.

21 As a general principle, the APA permits agencies to freely adopt and change interpretive
22 rules—regardless whether consistent with earlier interpretations—without engaging in the
23 rulemaking process, in part because interpretive rules “do not have the force and effect of law
24 and are not accorded that weight in the adjudicatory process.” *Perez v. Mortg. Bankers Ass’n*,

1 135 S. Ct. 1199, 1204 (2015). The government suggests application of the principle here neatly
2 disposes of this claim. But the inquiry is complicated by the countervailing principle that rules
3 characterized as “substantive” or “legislative” are subject to rulemaking, and the distinction
4 between “interpretive,” “substantive,” and “legislative” rules is rarely well-articulated or
5 understood. *See id.*; *Comm. For Fairness v. Kemp*, 791 F. Supp. 888, 893 (D.D.C. 1992) (“It is
6 not infrequently difficult to draw a precise distinction between rules which are merely
7 interpretative of statutes and those which are legislative or substantive in character.”).

8 Courts grappling with the distinction have described legislative rules as “those which
9 create law, usually implementary to an existing law,” and interpretive rules as “statements as to
10 what the administrative officer thinks the statute or regulation means.” *See, e.g., Gibson Wine*
11 *Company v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952); *Cabais v. Egger*, 690 F.2d 234, 238
12 (D.C. Cir. 1982). Substantive and legislative rules have also been characterized as rules
13 “affecting individual rights and obligations”—long an important touchstone for determining
14 whether rules are binding or have the force of law. *Chrysler Corporation v. Brown*, 441 U.S.
15 281, 313 (1979). The Ninth Circuit, adopting something like that basic framework, has
16 sometimes explained that substantive rules “effect a change in existing law or policy,” while
17 interpretive rules “merely clarify or explain existing law or regulations.” *Powderly v. Schweiker*,
18 704 F.2d 1092, 1098 (9th Cir. 1983). Attempting to synthesize some of those conceptions, some
19 courts have more recently explained that regardless the parties’ characterizations, for purposes of
20 determining whether a rulemaking requirement applies, the reviewing court is tasked with
21 determining whether the rule or policy or change affects any rights or obligations, or “genuinely
22 leaves the agency and its decisionmakers free to exercise discretion.” *CropLife Am. v. E.P.A.*,
23 329 F.3d 876, 883 (D.C. Cir. 2003). But whatever the precise language to be applied,
24 application of the general principles to a change of policy or interpretation made after long-

1 settled pattern or course of adjudication has often compelled a conclusion the change is
2 substantive, because it affects rights or changes the law, and thus compelled the corollary
3 conclusion that the change is impermissible, or subject to the APA’s rulemaking requirement, or
4 both. *See, e.g., Ruangswang v. Immigration & Naturalization Serv.*, 591 F.2d 39, 45–46 (9th
5 Cir. 1978) (“The unexplained specific eradication of substantially the same added investor
6 requirement during rule-making and the subsequent effort to reestablish the requirement by
7 adjudication require us to be especially concerned whether the INS gave adequate notice to Mrs.
8 Ruangswang.”); *Lal v. I.N.S.*, 255 F.3d 998, 1007 (9th Cir. 2001), opinion amended on reh’g,
9 268 F.3d 1148 (9th Cir. 2001) (“To suddenly change course and add this requirement now is an
10 arbitrary act that is impermissible and, even giving the BIA the deference it is due, should be
11 overturned.”); *cf. Syncor Int’l Corp. v. Shalala*, 127 F.3d 90, 94–95 (D.C. Cir. 1997) (noting
12 agency’s past interpretations of regulation are more binding than its past statutory interpretations
13 because “[o]therwise, the agency could evade its notice and comment obligation by ‘modifying’
14 a substantive rule that was promulgated by notice and comment rulemaking”).

15 Given the case law, the crux of the claim here that some internal policy or interpretive
16 change has caused an about-face in the agency’s previously long-settled pattern of adjudication,
17 and the absence of any records from the government offering some more plausible explanation
18 for the facts the employers have alleged, the court concludes the employers have offered a
19 plausible theory of relief and have thus adequately stated this claim.

20 *Claim III – 5 U.S.C. § 706(2)(A).* The employers’ third claim appears at this stage to be
21 their core claim: the government’s denial of their petitions, after years and sometimes decades of
22 approvals on the same facts and statutory and regulatory language, was (and remains) arbitrary
23 and capricious and therefore unlawful under 5 U.S.C. § 706. The government conceded at
24 argument that the employers have experienced at least “a change in result” here and

1 acknowledged no explanation has been given for why—but, it contends, those details are
2 irrelevant because the employers have never been entitled to rely on the prior results.

3 Two general principles have application here. The fact that an agency, by mistake,
4 oversight, or otherwise, has previously approved a visa petition “on one occasion does not create
5 an automatic entitlement to the approval of a subsequent petition.” *Royal Siam Corp. v.*
6 *Chertoff*, 484 F.3d 139, 148 (1st Cir. 2007). But it may be “that a pattern of visa grants of
7 sufficient magnitude could obligate the agency to provide a reasoned explanation for treating
8 similar situations differently.” *Fogo De Chao (Holdings) Inc. v. U.S. Dep’t of Homeland Sec.*,
9 769 F.3d 1127, 1144 (D.C. Cir. 2014); *see also ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901
10 (D.C. Cir. 1995). And despite the government’s protests to the contrary, the courts appear to be
11 in agreement that the fact the visa adjudications here were apparently all non-precedential need
12 not matter for purposes of application of the general requirement that an agency give “reasoned
13 explanation for treating similar situations differently.” *See, e.g., Davila-Bardales v. I.N.S.*, 27
14 F.3d 1, 5 (1st Cir. 1994); *see also Sang Goo Park v. Attorney Gen.*, 846 F.3d 645, 654 (3d Cir.
15 2017) (“[T]he BIA’s nonprecedential opinions have value in determining the agency’s policies
16 and practices[.]”); *De Leon v. Holder*, 761 F.3d 336, 344 (4th Cir. 2014) (“The BIA has adhered
17 to this approach in a number of unpublished decisions affirmed by courts of appeals.”). As the
18 *Davila-Bardales* court explained, “the prospect of a government agency treating virtually
19 identical legal issues differently in different cases, without any semblance of a plausible
20 explanation,” raises various arbitrariness concerns, and the agency should not then be permitted
21 to “take refuge” behind its own past (mis)characterizations of which adjudications may constitute
22 precedent. *Id.* (“[W]e see no earthly reason why the mere fact of nonpublication should permit
23 an agency to take a view of the law in one case that is flatly contrary to the view it set out in
24 earlier ... cases.”). It appears even the agency itself has in the past been aware of the very real

1 consistency problems visa adjudications pose—its predecessor’s Office of General Counsel, for
2 example, has advised that the agency in making these adjudications should “discuss, if
3 appropriate, why such decision might be different from that made in similar cases in the past.”
4 Mem. from the Off. of Gen. Counsel, INS, to Paul W. Virtue, Act. Exec. Assoc. Comm’r.,
5 Immig. & Nat. Svc. 1-2, reprinted in 75 Interpreter Releases 323, 332-49 (1998).

6 And thus regardless whether prior agency adjudications have been precedential or non-
7 precedential, it appears to be well-settled that an abrupt change in agency policy or decision
8 pattern without adequate explanation of the rationale may be arbitrary and capricious and
9 therefore unlawful. *See, e.g., Davila-Bardales*, 27 F.3d at 5 (“This zigzag course is not open to
10 an agency when, as now, the agency has failed to explain why it is changing direction.”); *De*
11 *Leon*, 761 F.3d at 344 (“The BIA cannot apply its official-restraint standard broadly when
12 broadness favors the government’s position and narrowly when it does not.”); *see also INS v.*
13 *Yang*, 519 U.S. 26, 32 (1996) (“If an agency announces and follows—by rule or by settled course
14 of adjudication—a general policy by which its exercise of discretion will be governed, an
15 irrational departure from that policy (as opposed to an avowed alteration of it) could constitute
16 action that must be overturned.”); *N.Y. Cross Harbor R.R. v. Surface Transp. Bd.*, 374 F.3d 1177,
17 1181 (D.C. Cir. 2004); *Int’l Union, United Auto., Aerospace, & Agric. Implement Workers of*
18 *Am. v. NLRB*, 802 F.2d 969, 973-74 (7th Cir. 1986) (emphasizing agency cannot change
19 direction without explaining rationale for change); *McHenry v. Bond*, 668 F.2d 1185, 1193 (11th
20 Cir. 1982) (concluding explanation for change was irrational and thus arbitrary and capricious).

21 Given those principles, the government’s concessions that the employers’ results have
22 changed and the agency has offered no explanation for the change, and the absence at this stage
23 of any administrative records that might contravene the employers’ account or offer some
24 satisfactory explanation for the circumstances, the court concludes the employers have stated a

1 plausible theory of relief and have thus adequately stated this claim.

2 *Claim IV – 5 U.S.C. § 706(2)(E).* The employers had initially advanced the contention
3 that the agency’s denials of the visa petitions were unsupported by substantial evidence and were
4 thus unlawful under 5 U.S.C. § 706(2)(E). But the government has since pointed out that section
5 706(2)(E) is inapplicable to the adjudications here and the employers now concede the section
6 has no application. *See* ECF No. 43 at 29. The court will dismiss this claim.

7 *Claim V – Declaratory Judgment Act.* In their fifth claim, the employers ask for a
8 declaratory judgment that the agency’s course of conduct here was in various ways unlawful.

9 A request for declaratory relief, the court notes, does not typically constitute an
10 independent cause of action—it generally offers a remedy based on some other underlying
11 theory of relief. *See, e.g., Circle v. W. Conference of Teamsters Pension Tr.*, 2017 WL 4102490,
12 at *3 (D. Or. Aug. 31, 2017) (no standalone claim for declaratory relief); *Barkett v. Sentosa*
13 *Properties LLC*, 2015 WL 502319, at *18 (E.D. Cal. Feb. 5, 2015) (“[D]eclaratory relief is not
14 an independent cause of action, but a remedy.”). It also appears the contentions advanced in this
15 claim are largely duplicative of those advanced in the preceding counts, which may
16 independently suggest dismissal is appropriate. *See, e.g., Perret v. Wyndham Vacation Resorts,*
17 *Inc.*, 889 F.Supp.2d 1333, 1346 (S.D. Fla. 2012) (“A court should not entertain an action for
18 declaratory relief when the issues are properly raised in other counts of the pleadings.”). Based
19 on the understanding a request for declaratory judgment cannot serve as a standalone claim, the
20 court will dismiss this claim but permit the employers to maintain the various requests for
21 declaration they make in their prayer for relief. *See, e.g., Rosenfeld v. JPMorgan Chase Bank,*
22 *N.A.*, 732 F.Supp.2d 952, 975 (N.D. Cal. 2010) (dismissing declaratory judgment cause of action
23 but permitting plaintiff to replead as requested remedy).

24 *Claim VI – Equitable Estoppel.* As a sixth claim, the employers contend that because the

1 agency has for many years granted visas “based on the same set of operative facts,” it is
2 “estopped from denying an identical petition based on the same set of adjudicative facts.” They
3 cite the recent Supreme Court case of *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126
4 (2016) in support—but that case makes no mention of estoppel.

5 The Ninth Circuit cases that do examine claims of estoppel made against the government
6 have established a very high bar for the claims, requiring a showing of “affirmative misconduct”
7 by the government. *Socop-Gonzalez v. I.N.S.*, 272 F.3d 1176, 1184 (9th Cir. 2001). Affirmative
8 misconduct, the *Socop-Gonzalez* court explained, has generally been defined as conduct
9 encompassing a “deliberate lie” or a “pattern of false promises.” *Id.* Negligence, even over a
10 period of many years, will not suffice. *See, e.g., id.; Woong Joo Yoon v. I.N.S.*, 236 F. App’x
11 270, 271 (9th Cir. 2007) (unpublished); *Murkerjee v. INS*, 793 F.2d 1006, 1009 (9th Cir. 1986).
12 And a claim failing to make these required allegations cannot support relief. *See, e.g., Maunting*
13 *v. I.N.S.*, 16 F. App’x 788, 791 (9th Cir. 2001) (unpublished); *see also Socop-Gonzalez*, 272 F.3d
14 at 1184.

15 Here, the employers have advanced no allegation of deliberate lie or pattern of false
16 promise, or any other misconduct that might satisfy the strict standard set for claims of
17 government estoppel. The court will dismiss this claim for failure to state a plausible theory of
18 relief.

19 *Claim VII – Injunctive Relief.* As their seventh and final claim, the employers ask for
20 broad injunctive relief. Much like their claim for declaratory relief, this claim appears to present
21 only a request for remedy, as opposed to some plausible underlying theory of relief. And courts
22 in the Ninth Circuit are in agreement, as they have been for claims of declaratory relief, that a
23 claim for “injunctive relief is not a standalone cause of action in federal courts.” *San Francisco*
24 *Apartment Ass’n v. City & Cty. of San Francisco*, 142 F. Supp. 3d 910, 935 (N.D. Cal. 2015);

1 *Jensen v. Quality Loan Serv. Corp.*, 702 F. Supp. 2d 1183, 1201 (E.D. Cal. 2010) (“A request for
2 injunctive relief by itself does not state a cause of action.”). The court will dismiss this claim but
3 permit the employers to maintain their requests for injunction as part of their prayer for relief.

4 *The Request for Preliminary Injunction and the Magistrate’s Report and*
5 *Recommendation.* Turning to the preliminary injunction request, under 28 U.S.C. § 636(b)(1),
6 the court “may accept, reject, or modify, in whole or in part, the findings or recommendations
7 made by the magistrate judge.” When a party timely objects to a magistrate’s report and
8 recommendation, the court is required to “make a de novo determination of those portions of the
9 report” for which objection has been made. 28 U.S.C. § 636(b)(1). By contrast, the court need
10 make no “review at all . . . of any issue that is not the subject of an objection.” *Thomas v. Arn*,
11 474 U.S. 140, 149 (1985); *United States v. Reyna-Tapia*, 328 F.3d 1114 (9th Cir. 2003). Having
12 reviewed de novo those portions of the Magistrate Judge’s report for which the employers have
13 presented objections, the court adopts in part and modifies in part the report, and modifies the
14 resulting recommendation.

15 Before digging into the disputed portions of the report, it may be useful to emphasize that
16 several of the standard preliminary injunction inquiries are no longer in dispute. The parties
17 have lodged no objections, in other words, to the Magistrate Judge’s conclusions that: (1) many
18 of the employers have adequately established a likelihood of certain, great, actual, and imminent
19 financial and other tangible and intangible harms in the absence of an injunction, and monetary
20 damages would be unrecoverable under the APA; (2) the balance of the equities weighs in the
21 employers’ favor; and (3) the public interest weighs in the employers’ favor. Those conclusions,
22 and their underlying findings, are well made. The absence of preliminary relief here poses
23 various massive, concrete, and imminent risks of harm for the employers and the public more
24 generally, from domino-like webs of bankruptcies and public health crises to environmental

1 harms and stalled and substandard completion of projects critical to the nation’s security and
2 defense.

3 The substantial and quantifiable economic harms alone—already unmanageable for some
4 of the employers—are sufficient to establish irreparable harm, given that they cannot later be
5 made whole under the APA. *See, e.g., Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975)
6 (“[A]bsent preliminary relief they would suffer a substantial loss of business and perhaps even
7 bankruptcy. Certainly the latter type of injury sufficiently meets the standards for granting
8 interim relief, for otherwise a favorable final judgment might well be useless.”); *Express One*
9 *Int’l, Inc. v. United States Postal Serv.*, 814 F.Supp. 87, 91 (D.D.C. 1992) (finding irreparable
10 injury where loss of 10–year \$1 billion contract would cause annual loss of \$130 million, would
11 impair bidder company’s relationships with subcontractors, and would cause significant capital
12 costs and lay-offs); *McGregor Printing Corp. v. Kemp*, 1992 WL 118794, at *5 (D.D.C. May 14,
13 1992) (concluding “the irretrievable monetary loss to [plaintiff] in combination with the loss in
14 employment to [plaintiff’s] employees” amounted to irreparable harm). And the significant
15 macroeconomic, health, environmental, and security concerns—concerns Congress has
16 apparently shared in establishing Guam-specific treatment² for these visas over both the past
17 decade and in the very recent National Defense Authorization Act for Fiscal Year 2018—are
18 clearly sufficient to support the Magistrate Judge’s conclusions that the balance of the equities
19 and the public interest weighs in favor of the employers, and perhaps heavily so. Having
20 reviewed these portions of the report and recommendation despite the lack of any objection, the
21 court adopts the Magistrate Judge’s findings and conclusions as slightly modified here: the
22 employers have established near certain substantial and irreparable harm, and the balance of the

23 ² *See, e.g., Consolidated Natural Resources of Act of 2008*, Pub. L. No. 110-229, § 6(b), 122 Stat. 754 (2008)
24 (exempting Guam nonimmigrant worker visas from statutory cap); *National Defense Authorization Act for Fiscal*
Year 2018, Pub. L. No. 115-91, § 1049(b)(1)(B), ___ Stat. ___ (2017) (exempting certain Guam nonimmigrant
worker visas from temporariness requirement).

1 equities and public interest factors weigh heavily in their favor.

2 Those conclusions apparently unobjectionable, the parties have instead focused their
3 attention on the question of the likelihood the employers will ultimately succeed on any of their
4 claims here. As a first point of contention, they disagree as to how best to characterize the nature
5 of the preliminary relief the employers seek, and thus as to precisely what showing of
6 “likelihood” the employers must establish. The Magistrate Judge observed that the employers
7 have requested “an order from this court remanding the case to USCIS and directing USCIS to
8 reopen and reverse the decisions . . . which related to the ‘peakload’ and ‘one-time occurrence’
9 definitions.” *See* ECF No. 61 at 8. That kind of order, the Magistrate Judge reasoned, would go
10 well beyond preservation of the status quo, because “the court is being asked to order USCIS to
11 alter its decisions.” *Id.* And as a result, the Magistrate Judge concluded the request constituted a
12 request not for prohibitory injunction, but instead one for affirmative, mandatory injunction,
13 subject “to heightened scrutiny and [not to be] issued unless the law and facts clearly favor the
14 Plaintiffs.” *Id.*

15 But what constitutes preservation of the status quo here requires slightly more analysis.
16 The relevant status quo, the Ninth Circuit has explained, is the legally relevant relationship
17 between the parties prevailing before any controversy has arisen. *See, e.g., Arizona Dream Act*
18 *Coal. v. Brewer*, 757 F.3d 1053, 1061 (9th Cir. 2014). And, as other courts have explained,
19 requiring a party who has “recently disturbed the status quo to reverse its actions . . . restores,
20 rather than disturbs, the status quo ante.” *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 378
21 (4th Cir. 2012). Earlier Ninth Circuit cases illustrate the principle. *See, e.g., Bay Area Addiction*
22 *Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 732 (9th Cir. 1999). In *Bay Area*
23 *Addiction*, certain pre-existing laws would have permitted relocation of a methadone clinic to the
24 town of Antioch, but before the plaintiff clinic operators could open in Antioch, the town passed

1 an ordinance to prevent the opening. *Id.* at 732 n.13. The clinic operators sought an injunction,
2 but Antioch contended an injunction forcing the town to allow the clinic would constitute a
3 mandatory injunction. *Id.* The *Bay Area Addiction* court rejected that argument, concluding the
4 injunction merely preserved the uncontested status quo prevailing before Antioch had upset it.
5 *Id.* Similarly, more recently, where a group of plaintiffs challenged the enforceability of a
6 change in Arizona policy that rendered them no longer eligible for driver’s licenses, the *Arizona*
7 *Dream Act* court noted Arizona had changed the prevailing status quo by changing its policy, and
8 it emphasized that “injunctions that prohibit enforcement of a new law or policy,” are to be
9 construed as prohibitory, and subject only to the standard preliminary injunction inquiries, as
10 opposed to the potentially heightened standard for requests for mandatory relief. *See, e.g.,*
11 *Arizona Dream Act Coal.*, 757 F.3d at 1061.

12 Here, the employers have alleged a change in policy or interpretation resembling the
13 changes featured in *Bay Area Addiction* and *Arizona Dream Act*, and they have alleged that
14 before the change, the positions they aim to fill were eligible for visas under one or more of the
15 agency’s temporary need categories. The agency’s alleged change in position, however, appears
16 to have rendered them ineligible for these visas—and the government does not dispute the
17 remarkable “change in result” the employers have identified—and thus the employers seek an
18 injunction restraining the agency from applying the new position until the merits of this case can
19 be evaluated. That, it seems, presents a classic case of one party affirmatively changing the
20 status quo and a responding party seeking to restore it, and the Ninth Circuit has explained that in
21 those circumstances, the preliminary relief sought is appropriately characterized as prohibitory.
22 *See, e.g., Arizona Dream Act Coal.*, 757 F.3d at 1061 (“The status quo before Defendants’
23 revised their policy in response to DACA was that Plaintiffs were subject to a legal regime under
24 which all holders of federal Employment Authorization Documents were eligible for Arizona

1 driver's licenses. By revising their policy in response to DACA, Defendants affirmatively
2 changed this status quo.”). The court will modify the Magistrate Judge’s conclusion accordingly
3 and conclude the employers need only make the standard showing of likelihood of success for
4 purposes of preliminarily restoring the status quo.³

5 Much ink has been spilled in analyzing the question of what “likelihood” might mean in
6 these circumstances. The *Winter* case setting forth the four-factor framework for evaluating the
7 propriety of preliminary relief appeared to discourage use of the “sliding-scale” approach
8 previously applied by the courts, which had allowed a strong showing of one element, like
9 likelihood of success, to compensate for a weaker showing of another, like irreparable harm.
10 See, e.g., *Winter*, 555 U.S. at 22. But the Ninth Circuit has more recently made clear that various
11 versions of the sliding-scale approach have survived, and that a party seeking relief need not
12 always show “probability of success”—instead, a preliminary injunction is appropriate whenever
13 a party demonstrates that “serious questions going to the merits [are] raised” and the balance of
14 hardships tips sharply in its favor. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th
15 Cir. 2011). A party must also establish a likelihood of irreparable injury and that the injunction
16 is in the public interest, but the government has not disputed the establishment of those elements
17 here and the employers have, as noted, made the requisite showings.⁴ *Id.* The court therefore

18
19 ³ The court notes the characterization as prohibitory or mandatory should not matter much, if at all, here for at least
20 two reasons. First, as the Ninth Circuit has recently explained, various authorities question “whether the line
21 between mandatory and prohibitory injunctions is meaningful,” and any attempt to distinguish between them may
22 well be counterproductive. *Hernandez v. Sessions*, 872 F.3d 976, 998 (9th Cir. 2017). And second, the showing of
significant and irreparable damage at stake here may by itself satisfy whatever heightened standard mandatory relief
requires. See, e.g., *United States v. Barrows*, 404 F.2d 749, 752 (9th Cir. 1968) (“[W]here irreparable damage to the
Government’s property interest was threatened, the court did not abuse its discretion in granting temporary relief
which, in effect, disturbed the status quo.”).

23 ⁴ Whether asking any of these questions makes much analytical sense in a judicial review proceeding is up for
24 debate, given that typically, all the plaintiff is entitled to do is “try to persuade the district judge and then [the court
of appeals], on the basis of evidence that was before [the agency at the time of its decision], that the decision was
unlawful.” *Cronin v. U.S. Dep’t of Agric.*, 919 F.2d 439, 445 (7th Cir. 1990). The question in most of these cases,
in other words, is simply “whether the plaintiff is entitled to an injunction, period,”—the standard “preliminary”

1 applies “the serious questions test” in analyzing the employers’ likelihood of success. *See, e.g.,*
2 *id.* (“Because it did not apply the “serious questions” test, the district court made an error of law
3 in denying the preliminary injunction.”).

4 And given the state of the record here, the court believes the employers have shown—to
5 the extent they can without knowing whether they have seen much, if any, of the agency’s
6 supporting documentation or internal guidance—serious questions regarding the merits. To fill
7 the gaping evidentiary hole as it currently stands, the employers have submitted various relevant
8 documents, including exhibits from the individual employers outlining the positions for which
9 they have recently sought visas and the status of those petitions, declarations and documentation
10 establishing the size of the H-2B workforce on Guam over the past two decades, and declarations
11 and documentation in support of the notion that the needs for which the employers have sought
12 visas have not changed much, if at all, over time. *See, e.g.,* ECF No. 8 at 6-7; *id.* Exh. 2. They
13 have added judicially-noticeable evidence that despite the unchanged needs, the pattern of
14 adjudication result has undergone drastic change for Guam-based employers: from an approval
15 rate approaching 100% prior to 2015 for visas sought for peakload and one-time occurrence
16 needs, to a denial rate of 76% in 2015, to a denial rate approaching 100% in 2016. *See* ECF No.
17 23 Exhs. 1, 2. They have also submitted documentation received from the agency which
18 provides some explanation for denials in individual cases, but conspicuously omits any
19 explanation as to why needs previously eligible for visas are no longer eligible and any
20 recognition that a pattern of result may have in fact changed. *See, e.g.,* ECF No. 23 Exh. 6 at 2–
21 7. That documentation, the court notes, is entirely unchallenged by the government at this point,
22 which has submitted no documentation of its own and has resisted production of the
23 administrative records at issue.

24

questions of relative harms, irreparability, and even likelihood of success may be irrelevant. *Id.*

1 On this limited record, there appears to be ample authority in the case law for concluding
2 the employers have raised serious questions as to the merits. The court recognizes that an
3 agency’s adjudicative interpretations and its interpretation of its own regulations are often
4 entitled to significant deference. *See, e.g., United States v. Larionoff*, 431 U.S. 864, 872 (1977);
5 *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414 (1945). Those interpretations will typically
6 “become[] of controlling weight unless [they are] plainly erroneous or inconsistent with the
7 regulation.” *See Bowles*, 325 U.S. at 414. But at the same time, the agency’s substantial
8 interpretive and adjudicative discretion is constrained by the longstanding administrative law
9 requirement of “reasoned decisionmaking.” *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522
10 U.S. 359, 374 (1998) (“[A]djudication is subject to the requirement of reasoned decisionmaking
11 as well.”). The reasoned-decisionmaking requirement, the Supreme Court has often observed,
12 includes a duty to explain any “departure from prior norms.” *Atchison, Topeka & Santa Fe Ry.*
13 *Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973). And norms may have arisen, the
14 Supreme Court has more recently indicated, in any scenario where an agency has historically
15 applied or established a general policy by “settled course of adjudication.” *Yang*, 519 U.S. at 32;
16 *see also De Leon*, 761 F.3d at 344. Where the agency then departs from application of that
17 policy without explanation, the courts are in widespread agreement that the departure is subject
18 to reversal as an abuse of the agency’s discretion. *See id.*; *see also Int’l Union, UAW v. NLRB*,
19 802 F.2d 969, 973-74 (7th Cir. 1986) (“[A]n administrative agency is not allowed to change
20 direction without some explanation of what it is doing and why.”); *see also Stardyne, Inc. v.*
21 *NLRB*, 41 F.3d 141, 153 (3d Cir. 1994) (“[T]he Board’s failure . . . to follow or repudiate its
22 prior holding . . . was arbitrary and capricious.”); *N.Y. Cross Harbor R.R. v. Surface Transp. Bd.*,
23 374 F. 3d 1177, 1183 (D.C. Cir. 2004) (“[N]owhere did the Board distinguish the earlier—and
24 uniform—adverse . . . precedent.”); *PDK Labs. Inc. v. United States Drug Enforcement Admin.*,

1 362 F.3d 786, 799 (D.C. Cir. 2004) (remanding agency decision for an unexplained departure).
2 And, as noted above in discussion of the government’s motion to dismiss, the duty of
3 explanation for departure is no less applicable for patterns of non-precedential adjudication,
4 which is how the government characterizes the denials here. *See, e.g., Davila-Bardales*, 27 F.3d
5 at 5–6; *see also Sang Goo Park*, 846 F.3d at 654 (“There is no apparent administrative-law
6 principle that removes unpublished, nonprecedential agency decisions from the reach of review
7 for arbitrariness”); *De Leon*, 761 F.3d at 344; *Sierra Club N. Star Chapter v. LaHood*, 693 F.
8 Supp. 2d 958, 973–74 (D. Minn. 2010) (“[W]hen an agency treats two similar transactions
9 differently, an explanation for the agency’s actions must be forthcoming.”); *accord Springfield,*
10 *Inc. v. Buckles*, 292 F.3d 813, 819 (D.C. Cir. 2002) (noting that while agency views may change,
11 courts require “a reasoned analysis indicating that prior policies and standards are being
12 deliberately changed, not casually ignored”).

13 Application of the duty-of-explanation authority here raises the requisite serious
14 questions—because the very limited record here compels conclusions that the agency (1)
15 established a pattern of adjudication, and (2) has now departed from that pattern without
16 acknowledgement or explanation. And as noted, the government has not, at this point, offered
17 any alternative evidence—it merely contends the facts are different and the legal authority
18 regarding norms, departures, and explanation is therefore inapplicable. Given this record, the
19 government’s failure to challenge it, the relevant legal authority, and the importance of
20 expeditious decision if anything resembling the status quo is to be preserved, the court concludes
21 the employers have established the requisite likelihood of success. *See, e.g., Martins v. United*
22 *States Citizenship & Immigration Servs.*, 962 F. Supp. 2d 1106, 1124 (N.D. Cal. 2013) (“In light
23 of the evidence and authority that Mr. Martins puts forth and Defendants’ failure to challenge it
24 or make any argument to support a contrary conclusion, the court finds that Mr. Martins has

1 shown a likelihood that he will succeed on the merits.”); *see also Univ. of Texas v. Camenisch*,
2 451 U.S. 390, 395 (1981) (“[G]iven the haste that is often necessary if [the status quo is] to be
3 preserved, a preliminary injunction is customarily granted on the basis of procedures that are less
4 formal and evidence that is less complete than in a trial on the merits.”). The court therefore
5 modifies the Magistrate Judge’s conclusion here, concludes the employers have raised serious
6 questions regarding the merits and the other preliminary injunction factors weigh sharply in their
7 favor, and concludes preliminary injunctive relief is warranted.

8 *Scope of the Injunction.* Having made that determination, a question remains as to the
9 appropriate scope of the relief. The Supreme Court has advised that “injunctive relief should be
10 no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.”
11 *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Any appropriate tailoring must be mindful of
12 both the injunction’s purpose, which is to restore the status quo pending any final resolution, and
13 the requirement that relief “must be tailored to remedy the specific harm alleged.” *See, e.g.,*
14 *McCormack v. Hiedeman*, 694 F.3d 1004, 1019 (9th Cir. 2012). In the final analysis, the court
15 granting relief should aim to “protect all . . . whose interests the injunction may affect.” *Bhd. of*
16 *Locomotive Engineers v. Missouri-Kansas-Texas R. Co.*, 363 U.S. 528, 532 (1960).

17 On the surface, the parties’ hotly-debated dispute as to what precisely constitutes the
18 “status quo” might appear to present some difficulties for fashioning the remedy, particularly in
19 the absence of an administrative record. Based on the limited documentation provided by the
20 employers, the status quo appears to encompass some pattern of positive adjudication—but for
21 the most part, what rationale, or rationales, the agency applied (or declined to apply) in granting
22 those previous petitions is unknown. The agency may have, as the employers allege, historically
23 applied some policy, guidance, or interpretation, which has now changed. It may have even
24 previously applied starkly different interpretations of the peakload and one-time occurrence

1 regulatory language. Or individual adjudicators with certain views of the underlying facts may
2 have retired or been replaced. Or an individual adjudicator's understanding of the facts, or the
3 needs of the employers, may have changed over time. None, any, or all of those circumstances
4 may have transpired. Whether any of those scenarios may be distinguishable or excusable for
5 purposes of evaluating the agency's underlying obligation is unclear.

6 But despite those uncertainties, one proposition regarding the status quo is reasonably
7 clearly established, at least on this limited record: for at least twenty years, somewhere between
8 95% and 100% of temporary worker petitions here on Guam were granted. The simple corollary
9 is this: it was historically true that these petitions were *not denied* based on failure to satisfy a
10 peakload or one-time occurrence condition. Now, by contrast, the parties are in agreement that
11 the agency is regularly denying petitions based on failure to satisfy those conditions. And thus
12 the appropriate scope of preliminary relief is straightforward. To restore the parties to the status
13 quo and do no more, and to best protect all interested parties, the agency must be preliminarily
14 enjoined from relying on failure to satisfy peakload or one-time occurrence conditions as
15 grounds for denying temporary worker petitions submitted by the employers (and perhaps any
16 parties similarly situated), in the absence of adequate explanation as to how and why the pattern
17 of adjudication has changed. The court takes no position as to whether any petitions submitted
18 will meet (or have met) any other eligibility criteria, or what, if anything, might constitute an
19 adequate acknowledgement of and explanation for departure. *See, e.g., Arizona Dream Act*
20 *Coal.*, 757 F.3d at 1061; *Davila-Bardales v. I.N.S.*, 27 F.3d at 6; *see also Coyotl v. Kelly*, 261 F.
21 Supp. 3d 1328, 1344 (N.D. Ga. 2017) (preliminary enjoining USCIS's adjudication in a manner
22 inconsistent with prior policy and ordering reconsideration consistent with established legal
23 principles).

24 *The Renewal of the Motion for Discovery or Supplementation of the Administrative*

1 *Record*. As the employers search for an answer to the question of why the pattern of
2 adjudication here has taken such an abrupt turn, they quite understandably seek any agency
3 documentation or evidence relating to the peakload and one-time occurrence conditions on which
4 adjudicators may have relied, directly or indirectly, both historically and more recently. The
5 request may well be warranted, for at least three related reasons. First, where a party can make a
6 showing the agency has failed to file the entire administrative record with the court, completion
7 and/or supplementation is appropriate. *See, e.g., Regents of Univ. of California v. United States*
8 *Dep't of Homeland Sec.*, 2017 WL 4642324, at *5 (N.D. Cal. Oct. 17, 2017) (“It is evident that
9 Acting Secretary Duke considered information directly, or indirectly, through the advice of other
10 agencies and others within her own agency. These documents, as set forth in detail below, should
11 be made part of the administrative record and must be produced by defendants[.]”); *The Fund for*
12 *Animals v. Williams*, 391 F.Supp.2d 191, 194 (D.D.C. 2005) (supplementing administrative
13 record upon a showing the government had excluded relevant documents adverse to the agency’s
14 position); *Ad Hoc Metals Coal. v. Whitman*, 227 F.Supp.2d 134, 140 (D.D.C. 2002)
15 (supplementing administrative record upon showing that document was presented at an agency-
16 sponsored workshop, even where comment period had closed, where document contained
17 adverse scientific views and evidence suggested the agency considered it). Second, given the
18 near-universal understanding that an agency has some obligation to apply its positions and
19 policies consistently across proceedings, the courts have been frequently willing to grant limited
20 supplementation of documentation and evidence of any internal policy, guidance, or
21 determination even indirectly related to the determinations made in a given proceeding. *See,*
22 *e.g., Pub. Citizen v. Heckler*, 653 F. Supp. 1229, 1237 (D.D.C. 1986) (admitting evidence of
23 prior internal and external statements of agency inconsistent with and adverse to most recent
24 agency position, and opining “[f]or an agency to say one thing—that all raw milk is a known

1 public health risk, and do another—refuse to ban all types of raw milk, is the essence of arbitrary
2 action.”); *see also Fund for Animals*, 391 F. Supp. 2d at 199 (“Supplementation of the
3 administrative record is warranted in challenges of the procedural validity of an agency’s
4 action.”); *Glob. Computer Enterprises, Inc. v. United States*, 88 Fed. Cl. 52, 71 (2009)
5 (admitting, in bid protest case, extra-record evidence of how other potential and actual bidders on
6 a contract might have understood its requirements). And third, while the government frequently
7 takes the position that internal communications, drafts, and policies are not properly part of the
8 administrative record, the courts in the Ninth Circuit are in agreement that deliberative process
9 evidence is “part of the universe of materials directly or indirectly considered by agency-
10 decision-makers” and must be made part of the record. *Ctr. for Food Safety v. Vilsack*, 2017 WL
11 1709318, at *4 (N.D. Cal. May 3, 2017); *see People of the State of California ex rel. Lockyer v.*
12 *U.S. Dep’t of Agric.*, 2006 WL 708914, at *3 (N.D. Cal. Mar. 16, 2006) (“Plaintiffs have also
13 shown that the record is incomplete because it lacks internal and external agency documents
14 relating to the decision-making process[.]”); *United Farm Workers v. Administrator, U.S. EPA*,
15 2008 WL 3929140, at *2 (N.D. Cal. Aug. 26, 2008) (explaining court’s review of whole record
16 under the APA includes any “internal correspondence, memoranda and drafts that were part of
17 the EPA’s decision making process”).

18 But any rulings regarding the sufficiency of the administrative record as designated by
19 the agency, whether it might require supplementation or completion, and whether the employers
20 may be entitled to any additional discovery are probably premature at this point. *See, e.g.,*
21 *Banner Health v. Sebelius*, 905 F. Supp. 2d 174, 187 (D.D.C. 2012) (“[B]ecause at the time the
22 instant motions were fully briefed the Secretary had not yet filed the complete administrative
23 record with the Court, the Court declines to issue any holdings regarding the scope of the
24 administrative record.”). The court will therefore deny as premature the portion of the

1 employers' motion seeking supplementation and grant the portion requesting immediate
2 production of the administrative records at issue in this case.

3 **IV. CONCLUSION**

4 Preliminary injunctions are extraordinary remedies. And an agency is entitled to wide
5 latitude in administering its programs. But where, as here, the chosen course appears to give rise
6 to serious legal questions and enormous and potentially irreparable effects for named parties
7 and society at large, the stale saw regarding "desperate times" takes on a special kind of
8 significance. The agency's most recent course prompts serious legal questions and poses very
9 real threats to the parties, the island, and the nation, in the form of inevitable bankruptcies, public
10 health and environmental issues, and security and defense dilemmas, among whatever other
11 untold complications. These rare circumstances call for rare relief.

12 The Defendants' motion to dismiss (ECF No. 30) is **GRANTED in part** and **DENIED**
13 **in part**. Plaintiffs' Claims ("Counts") 4, 5, 6, and 7 are **DISMISSED**. The Plaintiffs' motion
14 for preliminary injunction (ECF No. 8) is **GRANTED in part**.⁵ The Magistrate Judge's Report
15 and Recommendation (ECF No. 61) is **ADOPTED in part** and **MODIFIED in part** as noted.

16 It is **ORDERED** that the Defendants produce, as soon as is practicable, the
17 administrative record for all petitions identified by the Plaintiffs that have been previously finally
18 adjudicated as of the date of this Order.

19 It is further **ORDERED** that USCIS is preliminarily enjoined from relying on application
20 of the reasoning presented in its denials of the FY 2015 and FY 2016 petitions identified by the
21 Plaintiffs to deny any petitions previously submitted by the Plaintiffs or any petitions they submit
22 after the date of this Order, in the absence of adequate acknowledgement of a prior course of

23 ⁵ The parties briefly presented several additional oral evidentiary motions at the December 11 hearing. Those
24 motions, dispositions of which have been unnecessary for purposes of resolving the questions the court examines in
this order, are denied as premature and/or moot. The parties are free to reassert the motions as appropriate later in
the proceeding.

1 adjudication and adequate explanation for departure from that course. The earlier denials are
2 vacated.

3 It is further **ORDERED** that Defendants shall reconsider any prior petitions from the
4 Plaintiffs still eligible for prospective treatment, and shall adjudicate any petitions submitted by
5 the Plaintiffs after the date of this Order, in a manner consistent with both any longstanding
6 practice and this Order. The court expresses no opinion as to whether any petitions may meet
7 any relevant eligibility criteria.

8 It is further **ORDERED** that the Plaintiffs' prior labor certifications shall remain valid
9 through the end of the next period in which each individual Plaintiff may petition for and receive
10 a temporary visa.

11 It is further **ORDERED** that this Order shall remain effective until further order of the
12 court.

13 **SO ORDERED.**



/s/ Frances M. Tydingco-Gatewood
Chief Judge
Dated: Jan 24, 2018